

1
2
3 UNITED STATES DISTRICT COURT
4 WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 MARIA LOUISE JONES,

7 Plaintiff,

8 v.

9 CAROLYN W. COLVIN, Acting
10 Commissioner of Social Security,

11 Defendant.

Case No. 3:13-cv-05852-KLS

ORDER AFFIRMING DEFENDANT'S
DECISION TO DENY BENEFITS

12 Plaintiff, appearing *pro se* in this case, seeks judicial review of defendant's denial of her
13 applications for disabled widow's and supplemental security income ("SSI") benefits. Pursuant
14 to 28 U.S.C. § 636(c), Federal Rule of Civil Procedure 73 and Local Rule MJR 13, the parties
15 have consented to have this matter heard by the undersigned Magistrate Judge. After reviewing
16 the parties' briefs and the remaining record, the Court hereby finds that for the reasons set forth
17 below, defendant's decision to deny benefits should be affirmed.

18
19 FACTUAL AND PROCEDURAL HISTORY

20 On December 9, 2010, plaintiff filed applications for disabled widow's benefits and
21 another one for SSI benefits, alleging in both applications that she became disabled beginning
22 December 10, 2004. See ECF #19, Administrative Record ("AR") 13.¹ Both applications were
23

24
25 ¹ Plaintiff also filed an application for disability insurance benefits on the same date, alleging as well therein that she
26 became disabled beginning December 10, 2004. See id. But because as noted below plaintiff subsequently amended
her alleged onset date of disability to October 5, 2010, and because her date last insured is March 31, 2003, that
application was dismissed at the administrative hearing level. See id.; *Tidwell v. Apfel*, 161 F.3d 599, 601 (9th Cir.
1998) (to be entitled to disability insurance benefits, plaintiff "must establish that her disability existed on or before"
date her insured status expired, i.e., her date last insured). Plaintiff does not challenge the validity of that dismissal.

1 denied upon initial administrative review on December 17, 2010, and on reconsideration on
2 September 14, 2011. See AR 13. A hearing was held before an administrative law judge
3 (“ALJ”) on August 29, 2012, at which plaintiff, represented by counsel, appeared and testified,
4 as did a vocational expert. See AR 34-72. Subsequent to the hearing, plaintiff amended her
5 alleged onset date of disability to October 5, 2010. See AR 13.

6
7 In a decision dated October 9, 2012, the ALJ determined plaintiff to be not disabled. See
8 AR 13-27. Plaintiff’s request for review of the ALJ’s decision was denied by the Appeals
9 Council on July 29, 2013, making the ALJ’s decision the final decision of the Commissioner of
10 Social Security (the “Commissioner”). See AR 1; 20 C.F.R. § 404.981, § 416.1481. On
11 September 30, 2013, plaintiff filed a complaint in this Court seeking judicial review of the
12 Commissioner’s final decision. See ECF #3. The administrative record was filed with the Court
13 on January 7, 2014. See ECF #19. The parties have completed their briefing, and thus this
14 matter is now ripe for the Court’s review.

15
16 Plaintiff argues defendant’s decision to deny benefits should be reversed and remanded
17 for an award of benefits, because the ALJ erred: (1) in failing to find plaintiff had a severe
18 impairment consisting of cervical sprain with facet dysfunction; (2) in assessing plaintiff’s
19 residual functional capacity; (3) in finding plaintiff to be capable of returning to her past relevant
20 work; and (4) in finding plaintiff to be capable of performing other jobs existing in significant
21 numbers in the national economy. For the reasons set forth below, however, the Court disagrees
22 that the ALJ erred in determining plaintiff to be not disabled, and therefore finds defendant’s
23 decision to deny benefits should be affirmed.

24 DISCUSSION

25
26 The determination of the Commissioner that a claimant is not disabled must be upheld by

the Court, if the “proper legal standards” have been applied by the Commissioner, and the “substantial evidence in the record as a whole supports” that determination. Hoffman v. Heckler, 785 F.2d 1423, 1425 (9th Cir. 1986); see also Batson v. Commissioner of Social Security Admin., 359 F.3d 1190, 1193 (9th Cir. 2004); Carr v. Sullivan, 772 F.Supp. 522, 525 (E.D. Wash. 1991) (“A decision supported by substantial evidence will, nevertheless, be set aside if the proper legal standards were not applied in weighing the evidence and making the decision.”) (citing Browner v. Secretary of Health and Human Services, 839 F.2d 432, 433 (9th Cir. 1987)).

Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Richardson v. Perales, 402 U.S. 389, 401 (1971) (citation omitted); see also Batson, 359 F.3d at 1193 (“[T]he Commissioner’s findings are upheld if supported by inferences reasonably drawn from the record.”). “The substantial evidence test requires that the reviewing court determine” whether the Commissioner’s decision is “supported by more than a scintilla of evidence, although less than a preponderance of the evidence is required.” Sorenson v. Weinberger, 514 F.2d 1112, 1119 n.10 (9th Cir. 1975). “If the evidence admits of more than one rational interpretation,” the Commissioner’s decision must be upheld. Allen v. Heckler, 749 F.2d 577, 579 (9th Cir. 1984) (“Where there is conflicting evidence sufficient to support either outcome, we must affirm the decision actually made.”) (quoting Rhinehart v. Finch, 438 F.2d 920, 921 (9th Cir. 1971)).²

² As the Ninth Circuit has further explained:

... It is immaterial that the evidence in a case would permit a different conclusion than that which the [Commissioner] reached. If the [Commissioner]’s findings are supported by substantial evidence, the courts are required to accept them. It is the function of the [Commissioner], and not the court’s to resolve conflicts in the evidence. While the court may not try the case de novo, neither may it abdicate its traditional function of review. It must scrutinize the record as a whole to determine whether the [Commissioner]’s conclusions are rational. If they are ... they must be upheld.

Sorenson, 514 F.2d at 1119 n.10.

I. The ALJ's Step Two Determination

Defendant employs a five-step “sequential evaluation process” to determine whether a claimant is disabled. See 20 C.F.R. § 404.1520; 20 C.F.R. § 416.920. If the claimant is found disabled or not disabled at any particular step thereof, the disability determination is made at that step, and the sequential evaluation process ends. See id. At step two of the evaluation process, the ALJ must determine if an impairment is “severe.” 20 C.F.R. § 404.1520, § 416.920. An impairment is “not severe” if it does not “significantly limit” a claimant’s mental or physical abilities to do basic work activities. 20 C.F.R. § 404.1520(a)(4)(iii), (c), § 416.920(a)(4)(iii), (c); see also Social Security Ruling (“SSR”) 96-3p, 1996 WL 374181 *1. Basic work activities are those “abilities and aptitudes necessary to do most jobs.” 20 C.F.R. § 404.1521(b), § 416.921(b); SSR 85- 28, 1985 WL 56856 *3.

An impairment is not severe only if the evidence establishes a slight abnormality that has “no more than a minimal effect on an individual[']s ability to work.” SSR 85-28, 1985 WL 56856 *3; see also Smolen v. Chater, 80 F.3d 1273, 1290 (9th Cir. 1996); Yuckert v. Bowen, 841 F.2d 303, 306 (9th Cir.1988). Plaintiff has the burden of proving that her “impairments or their symptoms affect her ability to perform basic work activities.” Edlund v. Massanari, 253 F.3d 1152, 1159-60 (9th Cir. 2001); Tidwell v. Apfel, 161 F.3d 599, 601 (9th Cir. 1998). The step two inquiry described above, however, is a *de minimis* screening device used to dispose of groundless claims. See Smolen, 80 F.3d at 1290.

The ALJ in this case found plaintiff’s degenerative disc disease of the lumbar spine and right knee tendinitis/osteoarthritis to be severe impairments. See AR 17. Plaintiff argues the ALJ erred in not also finding she had a severe impairment consisting of a cervical sprain with facet dysfunction based on a diagnosis of the same made by Vatche Cabayan, M.D., in an evaluation

1 report dated August 3, 2005. See ECF #22, pp. 6, 25. That evaluation report, however, is not
2 part of the administrative record that is before the Court. Accordingly, the ALJ cannot be faulted
3 for failing to consider it. Further, the Court agrees with defendant that even if that report should
4 have been made part of the record, it would not have changed the ALJ's ultimate determination
5 of non-disability in this case.

6
7 This is because, as defendant points out, Dr. Cabayan offered this diagnosis more than
8 five years prior to plaintiff's amended alleged onset date of disability, and therefore is of little, if
9 any, relevance to the issue of impairment severity in this case. See Carmickle v. Commissioner,
10 Social Sec. Admin., 533 F.3d 1155, 1165 (9th Cir. 2008) ("Medical opinions that predate the
11 alleged onset of disability are of limited relevance."). In addition, none of the medical evidence
12 in the record pertaining to the relevant time period subsequent to the amended alleged onset date
13 of disability contains a diagnosis of cervical sprain with facet dysfunction, let alone indicates the
14 presence of any work-related functional limitations related thereto. Even if the ALJ did err in
15 failing to find this to be a severe impairment at step two, furthermore, such error was harmless³
16 given that as discussed in greater detail below, he went on to properly evaluate the relevant
17 medical evidence in the record concerning plaintiff's back-related functional limitations during
18 the later steps of the sequential disability evaluation process.⁴

20 II. The ALJ's Residual Functional Capacity Assessment

21 If a disability determination "cannot be made on the basis of medical factors alone at step
22

23 ³ See Stout v. Commissioner, Social Security Admin., 454 F.3d 1050, 1055 (9th Cir. 2006) (error harmless where it
24 is non-prejudicial to claimant or irrelevant to ALJ's ultimate disability conclusion); see also Parra v. Astrue, 481
F.3d 742, 747 (9th Cir. 2007) (finding any error on part of ALJ would not have affected "ALJ's ultimate decision.").

25 ⁴ see also Hubbard v. Astrue, 2010 WL 1041553 *1 (9th Cir. 2010) (because claimant prevailed at step two and ALJ
26 considered claimant's impairments later in sequential analysis, any error in omitting those impairments at step two
was harmless) (citing Lewis v. Astrue, 498 F.3d 909, 911 (9th Cir. 2007) (ALJ's error in failing to list bursitis at
step two harmless, where ALJ's decision showed any limitations posed thereby was considered later in sequential
disability evaluation process); Burch v. Barnhart, 400 F.3d 676, 682 (9th Cir. 2005) (any error in failing to consider
plaintiff's obesity at step two harmless, because ALJ did not err in evaluating plaintiff's impairments at later steps).

1 three of the evaluation process,” the ALJ must identify the claimant’s “functional limitations and
2 restrictions” and assess his or her “remaining capacities for work-related activities.” SSR 96-8p,
3 1996 WL 374184 *2. A claimant’s residual functional capacity (“RFC”) assessment is used at
4 step four to determine whether he or she can do his or her past relevant work, and at step five to
5 determine whether he or she can do other work. See id. It thus is what the claimant “can still do
6 despite his or her limitations.” Id.

7
8 A claimant’s residual functional capacity is the maximum amount of work the claimant is
9 able to perform based on all of the relevant evidence in the record. See id. However, an inability
10 to work must result from the claimant’s “physical or mental impairment(s).” Id. Thus, the ALJ
11 must consider only those limitations and restrictions “attributable to medically determinable
12 impairments.” Id. In assessing a claimant’s RFC, the ALJ also is required to discuss why the
13 claimant’s “symptom-related functional limitations and restrictions can or cannot reasonably be
14 accepted as consistent with the medical or other evidence.” Id. at *7.

15
16 The ALJ found plaintiff had the residual functional capacity:

17 **... to perform light work . . . in that she is able to occasionally lift and/or**
18 **carry 20 pounds; frequently lift and/or carry 10 pounds; stand and/or**
19 **walk for a total of 2 hours in an eight hour work day; sit for about 6**
20 **hours in an eight hour work day. She is capable of occasionally stooping,**
21 **kneeling, crouching, crawling, and climbing ramps and stairs, but never**
22 **climbing ladders, ropes, or scaffolds. She is further capable of work that**
23 **does not involve operating foot controls; that does not involve greater**
24 **than occasional exposure to extreme cold, excess wetness, and excess**
25 **vibration; and that does not involve operational control of moving or**
26 **hazardous machinery or unprotected heights.**

23 AR 18 (emphasis in original). Plaintiff argues – again based on Dr. Cabayan’s early August
24 2005 evaluation report and the diagnoses contained therein – that the ALJ erred in assessing her
25 with the above RFC, because it fails to show she has a work-related permanent disability. But as
26 discussed above, given that that report is dated more than five years prior to the amended onset

1 date of disability, plaintiff has failed to establish its relevance as to the nature and extent of her
2 work-related functional capacity during the pertinent time period. Plaintiff here too, therefore,
3 has failed to demonstrate reversible error on the part of the ALJ.

4 III. The ALJ's Step Four Determination

5 Based on the above residual functional capacity assessment and the testimony of the
6 vocational expert, the ALJ found plaintiff to be capable of performing her past relevant work as a
7 telemarketing surveyor. See AR 25. As with her argument concerning the ALJ's assessment of
8 her RFC, plaintiff argues this finding too is in error in light of Dr. Cabayan's evaluation report.
9 Plaintiff has the burden at step four of the disability evaluation process to show she is unable to
10 return to his or her past relevant work. Tackett v. Apfel, 180 F.3d 1094, 1098-99 (9th Cir. 1999).
11 She has failed to meet that burden here. For the same reasons plaintiff's reliance on that report is
12 unavailing in regard to the ALJ's RFC assessment, so too does it fail to provide a valid basis for
13 challenging the ALJ's step four determination. Plaintiff further argues the opinion evidence in
14 the record from other medical and non-medical sources supports her challenge at step four, but
15 she does not argue – let alone show – that the ALJ erred in rejecting that opinion evidence in the
16 record that conflicts with the residual functional capacity he assessed.⁵ Nor does the Court find
17 any basis for overturning the ALJ's rejection thereof.

20 IV. The ALJ's Findings at Step Five

21 If a claimant cannot perform his or her past relevant work, at step five of the disability
22 evaluation process the ALJ must show there are a significant number of jobs in the national
23 economy the claimant is able to do. See Tackett, 180 F.3d at 1098-99; 20 C.F.R. § 404.1520(d),
24

25 ⁵ See Carmickle v. Commissioner of Social Sec. Admin., 533 F.3d 1155, 1161 n.2 (9th Cir. 2008) (issue not argued
26 with specificity in briefing will not be addressed); Paladin Associates., Inc. v. Montana Power Co., 328 F.3d 1145,
1164 (9th Cir. 2003) (by failing to make argument in opening brief, objection to district court's grant of summary
judgment was waived); Kim v. Kang, 154 F.3d 996, 1000 (9th Cir.1998) (matters on appeal not specifically and
distinctly argued in opening brief ordinarily will not be considered).

1 (e), § 416.920(d), (e). The ALJ can do this through the testimony of a vocational expert or by
2 reference to defendant's Medical-Vocational Guidelines (the "Grids"). Tackett, 180 F.3d at
3 1100-1101; Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2000).

4 An ALJ's findings will be upheld if the weight of the medical evidence supports the
5 hypothetical posed by the ALJ. See Martinez v. Heckler, 807 F.2d 771, 774 (9th Cir. 1987);
6 Gallant v. Heckler, 753 F.2d 1450, 1456 (9th Cir. 1984). The vocational expert's testimony
7 therefore must be reliable in light of the medical evidence to qualify as substantial evidence. See
8 Embrey v. Bowen, 849 F.2d 418, 422 (9th Cir. 1988). Accordingly, the ALJ's description of the
9 claimant's disability "must be accurate, detailed, and supported by the medical record." Id.
10 (citations omitted). The ALJ, however, may omit from that description those limitations he or
11 she finds do not exist. See Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001).

13 At the hearing, the ALJ posed a hypothetical question to the vocational expert containing
14 substantially the same limitations as were included in the ALJ's assessment of plaintiff's residual
15 functional capacity. See AR 66. In response to that question, the vocational expert testified that
16 an individual with those limitations – and with the same age, education and work experience as
17 plaintiff – would be able to perform the jobs of injection molding machine tender, house sitter
18 and polystyrene off-bearer, each of which the vocational expert further testified are performed at
19 the light work level. See AR 67-68. Based on the testimony of the vocational expert, the ALJ
20 found plaintiff to be capable of performing those jobs at step five as jobs existing in significant
21 numbers in the national economy. See AR 25-26. Although plaintiff argues the ALJ erred in
22 relying on the jobs the vocational expert identified because the Dictionary of Occupational Titles
23 ("DOT") does not describe them as being performed at the light work level, the descriptions of
24
25
26

1 those jobs contained in the DOT clearly shows otherwise.⁶

2 CONCLUSION

3 Based on the foregoing discussion, the Court hereby finds the ALJ properly concluded
4 plaintiff was not disabled. Accordingly, defendant's decision to deny benefits is AFFIRMED.

5 DATED this 9th day of April, 2014.

6
7
8 
9 Karen L. Strombom
10 United States Magistrate Judge
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

⁶ See DOT 556.685-038 (injection molding machine tender), 1991 WL 683482; DOT 309.367-010 (house sitter), 1991 WL 672664; DOT 556.685-062 (polystyrene molding machine tender), 1991 WL 683488.